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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LIPSCOMB,

Defendant and Appellant.

A128549

(San Francisco City & County  
Super. Ct. No. 204082)

Defendant Kevin Lipscomb drove down Townsend Street in San Francisco and, without any provocation, shot and seriously injured a stranger who was standing on the sidewalk. He fled the scene in his car but was soon spotted by a number of San Francisco police officers, who began a pursuit. Defendant led them on a high-speed chase through the city streets, eventually abandoning his car to flee on foot when he became stuck in traffic. He was apprehended in an abandoned building and arrested. Following a jury trial in which defendant was convicted of multiple charges, the trial court sentenced him to 67 years to life.

Defendant now challenges his conviction on the ground that the victim's identification of him as the shooter was obtained in what he claims was an unduly suggestive manner. He contends that his trial counsel's failure to move to strike the identification constituted ineffective assistance, and that admission of the evidence violated his federal and state rights to due process. He also contends that a \$27,800

restitution fine imposed by the trial court must be reduced to \$10,000, the maximum fine permitted by Penal Code section 1202.4, subdivision (b).<sup>1</sup>

As the People concede, defendant's argument concerning the restitution fine is well taken, and we order the abstract of judgment amended accordingly. His ineffective assistance of counsel and due process claims, however, lack merit. We thus affirm the judgment, subject to the aforementioned amendment.

## **FACTUAL BACKGROUND**

### **The Shooting**

On June 4, 2007, at approximately 11:55 a.m., Kenneth Lee parked his car on Townsend Street in San Francisco, got out, and walked to a nearby crosswalk where he waited for the pedestrian crossing light to turn green. As he stood there, a silver Dodge Charger driven by defendant pulled up into the crosswalk. Defendant made eye contact with Mr. Lee and kept looking over at him. Because Mr. Lee thought perhaps he knew the driver or that he was lost and wanted directions, he bent down to peer in through the open passenger side window and asked, "Can I help you?" Defendant, whom Mr. Lee did not recognize, looked at him with a smirk on his face and reached out as if he were going to hand him something. Instead, defendant shot him two to three times. Mr. Lee, who suffered gunshot wounds to his left forearm and both groins, collapsed onto the sidewalk. Defendant drove away.

San Francisco police officer Richard Lee<sup>2</sup> was in a nearby store on Townsend Street when he heard two gunshots. He immediately ran outside and saw Mr. Lee on the ground. As he ran towards him, Officer Lee saw some bystanders pointing down Third Street. He looked in the direction they were pointing and saw the back of a silver car that looked like a Dodge Charger. As he was running, he radioed to police dispatch that there had been a shooting and that the suspect was in a silver car that was heading down

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<sup>1</sup> All statutory references are to the Penal Code, except where otherwise noted.

<sup>2</sup> Presumably no relation to the victim.

Townsend Street past Third Street. He then turned his attention to Mr. Lee. Over the radio, he heard other officers reporting that they had the silver car in their view.

### **The Police Chase**

Officer Anthony Holder and recruit Officer Christine Hayes had just initiated a traffic stop on New Montgomery Street near Mission Street when they heard a radio broadcast of shots fired near Third and Townsend Streets, with the suspect in a gray or silver car heading towards the freeway. Anticipating that the driver might attempt to get on the Bay Bridge, they got in their patrol car and drove to the area of Bryant and Second Streets. As they were stopped at a red light, Officer Holder spotted a gray Dodge Charger being driven by defendant heading towards them. The officer made a U-turn and pulled up behind the car. When he did so, defendant suddenly accelerated and sped off. Officers Holder and Hayes took off in pursuit and were soon joined by San Francisco Police Officer Gary Peachey and others.

After leading the police on a high-speed chase through the city streets—reaching speeds of 80 miles per hour at one point, as well as hitting a car that was stopped in traffic—defendant eventually became unable to maneuver through traffic, so abandoned his car at Mission Street and New Montgomery and fled on foot. Officers Holder and Hayes followed him, with Officer Peachey right behind. They chased him into an alley before briefly losing sight of him. Officer Peachey noticed a construction worker pointing to the door of an abandoned building, so he went inside. Searching the building, he found defendant in a bathroom, breathing hard and with his shirt stripped off. Defendant was taken into custody without further incident.

Meanwhile, other officers who had been involved in the pursuit had secured defendant's abandoned car, which bore the license plate "5RLG375." Inside, they found a .40-caliber, semi-automatic handgun lying on the front passenger seat. The hammer of the gun was cocked, which typically indicates that the gun has recently been fired. They also found three bullet casings, an unfired .40-caliber bullet, and a wallet containing defendant's driver's license. Defendant's fingerprint was found on the gun, as well as on other objects in the car, and the driver's side headliner and a glove in the car tested

positive for gunshot residue. A bullet jacket found at the scene of the shooting had been fired from the gun found in defendant's car.

### **Witnesses to the Shooting**

There were numerous witnesses to the incident. Lindell Wilson was walking down Townsend Street when he heard a "pop." He looked up in the direction of the noise, heard another "pop," and then saw Mr. Lee drop to the ground about 125 yards away. A silver car—the only car that Mr. Wilson remembered seeing in the vicinity—then drove past him down Townsend. Mr. Wilson was on the driver's side of the car, and through the open driver's side window, saw defendant behind the wheel. The car stopped at the next intersection because the light was red, which gave Mr. Wilson enough time to note the license plate number—5RLG375—and write it down. He then gave the number to the police who responded to the scene.

Kerry Atkinson was also walking on Townsend Street, getting ready to have lunch with his wife and a coworker. As he was standing on the street corner, a silver car stopped in the crosswalk across the street from him. The windows were down on both sides of the car, and through the open window he could see the silhouette of a stocky, black man in the driver's seat. He saw Mr. Lee bend down to the car window and have an exchange with the driver. He heard two shots come from the car and saw Mr. Lee fall to the ground. The car then drove off down Townsend Street. Mr. Atkinson ran over to help Mr. Lee, and when Officer Lee arrived, he provided a description of the car and the direction in which it was heading. Mr. Atkinson was later taken to New Montgomery and Mission Streets and shown defendant's car, which he identified as the car he saw leave the scene of the shooting. He was unable to positively identify defendant as the driver, but he said that defendant was "very similar" to the shooter.

William Sherman was at an automobile window repair shop on Townsend Street. He had just walked out of the shop and headed left onto Townsend towards Third Street when he heard two gunshots. Looking across the street from where the sound had come, he saw a grey or silver car stopped in or near a crosswalk and Mr. Lee lying on the street. The car then pulled away slowly, stopped at a red light at Third and Townsend, and

turned toward Second Street. Because he suspected that the car had been involved in some kind of incident, Mr. Sherman tried to note the license plate but was only able to get the numbers and not the letters. He gave the partial plate—5\_ \_ 375—to Officer Lee. He was later taken to another location, where he identified defendant's car as the car he saw on Townsend Street.

A nearby security camera captured an image of a car resembling defendant's on Townsend Street at the time of the shooting.

### **Mr. Lee's Identification of Defendant**

Mr. Lee suffered serious injuries and was taken to San Francisco General Hospital, where he would undergo surgery. Before he was taken into surgery, however, the police brought defendant to the hospital for possible identification. Mr. Lee, who had been given "a lot" of pain medication, could not say "100 percent" that defendant was the assailant, although he noted that they shared some similarities, such as the roundness of the face, build, age, and mustache.

At a preliminary hearing in 2008, however, Mr. Lee positively identified defendant as the shooter. And he reiterated his positive identification at trial, explaining he had no doubts because "I'll never forget those eyes." At trial, Mr. Lee explained why he had been unable to make a positive identification in the hospital but could do so at the preliminary hearing: "Well, I was of clear mind. And the circumstances which I—at the hospital, I couldn't in my heart, because I really wasn't 100 percent coherent, having just been shot, pumped full of medication, being pressured to go into surgery and having all the inspectors trying to get a statement from me and make an identification, I just didn't think it was fair to—I couldn't do it."

On cross-examination, Mr. Lee acknowledged that on the day of the preliminary hearing, while he was waiting outside the courtroom, one of the officers involved in the case put a file down on the bench next to him, and he saw defendant's picture on the file. Mr. Lee told the officer, "That's the guy who shot me." The officer responded, "You didn't see this."

### **Defendant's Confession**

San Francisco police inspectors Mike Morley and Rich Danielly interviewed defendant shortly after his arrest. When asked if he would like to talk about what happened that day, defendant responded that he was “just tripping,” that he “[j]ust was upset,” “frustrated,” and depressed because he was broke and could not get a better job. He then explained that he drove his wife’s car from Vallejo, and as he was driving down a street in San Francisco, he saw an Asian man walking. He stopped his car and said, “Excuse me.” When the man looked over, he fired two to three times through the open passenger window with a .40-caliber gun that he had bought off the street. This was, according to defendant, the first time he had ever shot someone randomly. He claimed he was not trying to hurt anybody and that he felt bad afterwards. He also claimed that he did not realize that he shot the man. He had seen Mr. Lee at the hospital, and denied that he was the man at whom he had fired his gun. When asked what happened after he fired the gun, defendant admitted leading the police on a high-speed chase.

### **PROCEDURAL BACKGROUND**

Defendant was charged in a five-count, amended information as follows:

(1) attempted murder (§§ 664/187, subd. (a)); (2) evading a police officer with willful and wanton disregard for the safety of persons and property (Veh. Code, § 2800.2); (3) possession of a firearm by a felon (§ 12021, subd. (a)(1)); (4) discharging a firearm from a motor vehicle (§ 12034, subd. (c)); and (5) assault with a semiautomatic firearm (§ 245, subd. (b)). Counts 1 and 4 alleged that defendant personally and intentionally discharged a firearm which caused great bodily injury. Count 5 alleged that defendant used a firearm within the meaning of section 12022.5, subdivision (d). It was further alleged that defendant was ineligible for probation due to his prior felony convictions and that he had three prior serious felony convictions with state prison terms.

A jury trial commenced on December 9, 2008, and the presentation of evidence concluded on January 8, 2009. As noted above, during trial, Mr. Lee testified that just prior to his preliminary hearing testimony in which he identified defendant as the man who shot him, he saw a police file containing defendant’s mug shot and commented to a

police officer, “That’s the guy that shot me.” The officer responded, “You didn’t see this.” In light of this testimony, counsel for defendant requested a special jury instruction on the suppression of evidence, as follows: “If a police officer or a member of the police department tried to hide evidence or discourage someone from testifying as to a point, that conduct may show that he or she was aware of how what actually occurred might affect the burden of proof and the presumption of innocence. [*sic*] If you conclude that such an attempt was made, it is up to you to decide its meaning and importance.” The court declined to give this proposed instruction.

After one day of deliberations, the jury convicted defendant of counts 2 through 5, and found true that he personally and intentionally discharged a firearm. It deadlocked on the attempted murder charge. Defendant later stipulated to the factual basis for two of the prior felony convictions, and the court found the allegations of the prior convictions to be true.

On September 15, 2009, defendant moved for new trial, citing the trial court’s denial of his request for a special instruction regarding the “destruction of exculpatory evidence, to wit, Kenneth Lee’s inability to identify the defendant.” The trial court denied the motion.

On February 19, 2010, the court sentenced defendant to 67 years to life in state prison. It also imposed a restitution fine of \$27,800, as well as victim restitution to Mr. Lee.

This timely appeal followed.

## **DISCUSSION**

### **A. Defendant’s Claims of Ineffective Assistance of Counsel and Violation of His Right to Due Process Lack Merit**

Defendant challenges the validity of his conviction on that ground that Mr. Lee’s identification of him as the shooter was procured in an unduly suggestive manner, specifically, that it was improperly influenced by the police officer who let him see—unintentionally or otherwise—defendant’s mugshot while he was waiting to testify at defendant’s preliminary hearing. Defendant contends that his counsel should have

moved to strike Mr. Lee's identification of him, and that the failure to do so amounted to ineffective assistance of counsel. Further, he claims that admission of Mr. Lee's testimony at trial violated his right to due process. We need not decide whether Mr. Lee's identification was improperly influenced, however, because in order to prevail on his claims, defendant must also demonstrate that he was prejudiced by the alleged error. This, he cannot do.

In *People v. Ledesma* (1987) 43 Cal.3d 171, our Supreme Court explained the showing necessary to obtain a reversal of a conviction on ineffective assistance of counsel grounds: “ ‘A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.’ [Citations.] ‘First, the defendant must show that counsel's performance was deficient.’ [Citations.] Specifically, he must establish that ‘counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.] [¶] In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny.” (*Id.* at p. 216.) The court then explained the second component: “[A] criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim.” (*Id.* at p. 217.) “ ‘The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*Id.* at pp. 217-218; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Babbitt* (1988) 45 Cal.3d 660, 707; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.)

It is well established that “[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) Here, the evidence of defendant's guilt was so overwhelming that even without Mr. Lee's



identification, there was no reasonable probability that defendant would have been acquitted.

Multiple eyewitnesses identified defendant's car as the car involved in the shooting. Lindell Wilson saw a silver car driving away from the scene of the shooting. He wrote down the license plate number, which matched that of the car defendant was driving during the police chase. Mr. Wilson also identified defendant as the driver of the car. Kerry Atkinson saw a silver car leaving the scene, and when later shown defendant's car, identified it as the car he saw leaving the shooting. William Sherman saw a silver or gray car leaving the scene and noted the numbers of the license plate, numbers that matched those on defendant's plate. He later identified defendant's abandoned car as the car he saw leaving the shooting. Officer Lee, who was in a nearby store when the shooting occurred, saw witnesses pointing to a car that was leaving the scene, a car he identified as a Dodge Charger, which was the make and model of defendant's car. Finally, a closed-circuit television in the vicinity of the shooting recorded a Dodge Charger at the scene at the time of the shooting.

A car matching the description of that involved in the shooting was spotted by numerous San Francisco police officers within moments of the shooting, and defendant was driving that car. Officers Holder and Hayes, who led the pursuit, saw defendant exit the Dodge Charger and continue running on foot. Officer Peachey chased defendant from the car to the abandoned building where he was ultimately arrested.

Further, the forensic evidence tied defendant to the shooting. A gun bearing defendant's fingerprint was found in his car, and gunshot residue was detected on the car's headliner and a glove found in the car. A bullet casing retrieved from the scene of the shooting had been fired from the gun in defendant's car.

Finally, defendant admitted to Inspectors Morley and Danielly that he fired his gun at an Asian man walking down the street in San Francisco.

In light of this evidence, there can be no question but that the outcome of the trial would have been the same even without Mr. Lee's identification. As defendant cannot establish that but for his counsel's failure to move to strike Mr. Lee's identification, there

was a reasonable probability that the outcome would have been different, his ineffective assistance of counsel claim fails.

The absence of prejudice similarly defeats defendant's claim that he was deprived of due process. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [where defendant was deprived of a federal constitutional right, no reversal where error was harmless beyond a reasonable doubt].) In light of the overwhelming evidence of defendant's guilt, as detailed above, there can be no doubt that any claimed error in the admission of Mr. Lee's identification was harmless.

Defendant impliedly concedes the correctness of this conclusion. In his opening brief, he argues that Mr. Lee's identification of defendant was the result of an unduly suggestive identification process, and that without it, the prosecution would have had "a difficult time establishing beyond a reasonable doubt that [defendant] was the man who shot Lee." In response, the People detail the extensive evidence, aside from Mr. Lee's identification, establishing that defendant was the shooter, and argue that in light of the evidence, defendant cannot show prejudice. In reply, *defendant completely fails to acknowledge this argument*. Rather, he merely reargues his position that Mr. Lee's identification was unduly influenced and therefore unreliable. He ignores the eyewitness testimony and forensic evidence tying him to the crime, baldly concluding that "Lee's identification of [defendant] at trial was necessarily prejudicial to appellant." By failing to respond to the People's argument that he was not prejudiced by the admission of Mr. Lee's identification because of the other evidence identifying him as the shooter, defendant has as much as conceded the validity of the argument.

#### **B. The Restitution Fine Must Be Reduced to \$10,000**

Defendant's second argument is that the court erred when it ordered him to pay a \$27,800 restitution fine, contending that the maximum allowable fine is \$10,000. As the People concede, defendant is correct.

Under the version of section 1202.4 in effect at the time plaintiff was sentenced, absent "compelling and extraordinary reasons," the trial court was required to impose a restitution fine, which fine "shall not be less than two hundred dollars (\$200), and not

more than ten thousand dollars (\$10,000), if the person is convicted of a felony.” (§ 1202.4, subd. (b)(1).) Here, trial court calculated the fine as follows: \$5,000 for count 2; \$5,000 for count 3; \$10,000 for count 4; and \$7,800 for count 5, for an aggregate fine of \$27,800. We are unaware, however, of any authority suggesting that the \$10,000 maximum fine established by section 1202.4, subdivision (b)(1) is *per count*, rather than in the aggregate. We therefore order the abstract of judgment amended to reflect an aggregate restitution fine of \$10,000.

### **DISPOSITION**

The abstract of judgment shall be amended to reflect a restitution fine of \$10,000. In all other regards, the judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.